

LEGAL REVIEW NOTE

Bill No.: SB 329

LC#: LC1282 To Legal Review Copy, as of
February 13, 2017

Short Title: Adopt Pain-Capable Unborn Child
Protection Act

Attorney Reviewers: Todd Everts/Alexis
Sandru/Erin Bills

Date: February 13, 2017

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

As drafted, LC 1282 adopts the Montana Pain-Capable Unborn Child Protection Act, which prohibits the abortion of an unborn child capable of feeling pain. The Act defines an unborn child capable of feeling pain as an unborn child whose probable post-fertilization age is 20 or more weeks.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, section 10, of the Montana Constitution protect a woman's decision to terminate her pregnancy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Armstrong v. St.*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The United States Supreme Court has interpreted this right to mean that a woman has a right to choose to have an abortion before viability without undue interference from the state, *Casey*, 505 U.S. at 846, and has acknowledged that viability may exist at 23 to 24 weeks since a woman's last menstrual period (which equates to approximately 21 to 22 weeks probable post-fertilization age). *Id.* at 860. Recently, the federal Ninth Circuit Court of Appeals held that Idaho's Pain-Capable Unborn Child Protection Act, which banned the abortion of fetuses 20 or more weeks post-fertilization, was unconstitutional on its face because the act categorically banned pre-viability abortions and placed an arbitrary time limit on when woman can obtain abortions. *McCormack v. Herzog*, 788 F.3d 1017, 1032 (9th Cir. 2015).

Under Montana's unique constitutional guarantee to the right of privacy, which provides broader protection of the right of privacy than is afforded under the United State Constitution, the Montana Supreme Court has interpreted the right to mean that a woman has a right to choose to have an abortion before viability unless the state can demonstrate a compelling interest for infringing the right. *Armstrong*, 1999 MT 261, ¶ 75, 296 Mont. 361, 390, 989 P.2d 364, 384.

Because LC 1282 prohibits abortion entirely after a fetus is 20 or more weeks post-fertilization, the bill may raise potential conformity issues with the requirements of the United States Constitution and Montana Constitution.

Requester Comments:

In the legal review of LC 1282 it is pointed out that the Montana Supreme Court has interpreted the MT Constitution's right to privacy "to mean that a woman has a right to choose to have an abortion before viability unless the state can demonstrate a compelling interest for infringing the right." There are children that have survived after only 20 weeks of gestation, so when viability occurs comes into question. The unborn experiencing pain should be a compelling interest for the state.

Keith Regier